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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 554

BERNARD BLOCH, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Your Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 12, 1955.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 226 Pac. 2d 185 (App. A1).

JURISDICTION

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was entered on the 12th day of October, 1955. A timely motion for rehearing

Numbers following the letter "R" refer to pages of the Record.

was filed and on November 15, 1955 an order was entered by the Circuit Court of Appeals denying the Petition for Rehearing. (R. 311; App. A9). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED

Is it prejudicial error to ask a defendant being tried for violation of the Federal Narcotic Law if he has ever been convicted of a felony, when the only record known to the Assistant United States Attorney asking the question is a conviction in the same Court for violation of the Internal Revenue Laws relating to income tax, which case, at the time the question was asked, was on appeal to the Circuit Court of Appeals and subsequently reversed?

Bloch vs. U.S.
223 Fed. 2d 297.

STATUTES INVOLVED

We believe there are no statutes involved which are necessary to determine the merits of this case or the granting of this Petition.

STATEMENT

This case was instituted in the United States District Court For the District of Arizona by an indictment, six counts of which charge the defendant with the sale of narcotic drugs not in pursuance of a written order and not in the course of professional practice, in violation of 26 U.S.C., Sec. 2554(a).

During the trial of the case the defendant was asked, on cross examination, if he had ever been convicted of a felony. His reply was:

"Yes. But it is up on appeal". (R. 222).

A verdict of guilty was returned on six counts of indictment and a motion for a new trial was timely made. (R. 23).

The case was duly appealed to the Circuit Court of Appeals for the Ninth Circuit and that Court affirmed the conviction. (App. A7).

The jurisdiction of the District Court For the District of Arizona is based upon Title 26 U.S.C., Section 2554(a).

The jurisdiction of the Circuit Court of Appeals is based on Title 28, U.S.C., Section 1291.

On the appeal to the Circuit Court of Appeals Specification of Error Number IV, which is set out in the Opinion of that Court, was as follows:

> "Prejudicial error was committed by the misconduct on the part of the Assistant United States Attorney in asking the defendant if he had ever been convicted of a felony".

In passing upon this Specification of Error the Circuit Court of Appeals, after admitting that the Federal Courts were in conflict, stated:

> "As we read the applicable decision we do not hesitate to say that an attorney familiar with the state of the law, as we must assume the Assistant United States Attorney was, could very reasonably conclude that the question was proper and be well within the bounds of propriety in asking it."

REASONS FOR GRANTING WRIT

The question presented by this Petition and which was raised in the Circuit Court by Specification Number IV is an important legal question and is of continuing importance as it can arise in both criminal and civil cases, where an attempt is made to impeach a witness, whether the witness be a party to the case or not, where the witness has been convicted of a felony and the case in which he was convicted is on appeal.

There is a diversity of opinion in the State Courts, as well as in the Federal Courts, on this question. The Seventh Circuit held that the question was proper.

U.S. vs. Empire Packing Co.
174 Fed. 2d 17

In that case, however, trial was before the Court without a jury.

The Circuit Court of Appeals for the District of Columbia held that the question was not proper impeachment and constituted prejudicial error.

Campbell vs. U.S.
176 Fed. 2d 45.

The Circuit Court of Appeals for the Ninth Circuit, in the present case, admitted the conflict in the decisions and, in substance, held that the question was proper.

We therefore have three of our Circuit Courts of Appeals passing on this question with a definite conflict. The Circuit Court of Appeals for the Ninth Circuit in the present case admitted the conflict and has, in effect, followed the opinion by the Circuit Court of

Appeals for the Seventh Circuit and has held the question to be proper although, to some extent, the opinion leaves the decision up to the United States Attorney trying the case to decide the propriety of the question.

Whichever view we take of the Opinion of the Circuit Court of Appeals for the Ninth Circuit it is in direct conflict with the Court of Appeals for the District of Columbia.

In view of this conflict by the Circuits and in view of the continuing importance of this question, both to the United States and to the defendants in criminal cases and to all parties in civil cases Certiorari should be granted in order that a rule be established governing all Federal Courts.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BERNARD BLOCH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 14, 536

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Before: HEALY, ORR and POPE, *Circuit Judges*
ORR, *Circuit Judge*:

Appellant was convicted in the United States District Court for the District of Arizona on six counts of an indictment charging unlawful acquisition and sale of narcotics in violation of 26 U.S.C.A. §1554, 1948. The several counts charge a series of narcotics sales allegedly made by appellant not in pursuance of a written order on a Treasury Department order form, nor pursuant to a prescription and not in the regular course of professional practice as a doctor.

We summarize the facts: Appellant, an osteopath, practiced as such for eight years in Sunnyslope, Arizont, where the sales took place.

Cantu, an agent of the Federal Bureau of Narcotics, testified that he was first introduced to appellant by

a government informer, one Hernandez, on September 24, 1953 at appellan't's office. Cantu was introduced as Hernandez' brother. The first sale was consummated on that occasion. Cantu testified that the other sales charged took place at intervals thereafter until November 19, 1953. Appellant was arrested immediately following the final sale. Cantu further testified that at no time was he given a medical examination by the appellant; that he was never asked if he was sick or an addict, and that insofar as he knew no patient card was ever prepared in his case, notwithstanding that it was appellant's practice to keep such cards on all patients. Cantu, in purchasing the narcotics represented to appellant that he desired to get them for girls he stated he had in his employ. Cantu further testified that appellant charged him in excess of the sum of $200 for drugs which would be available to a physician for about four dollars.

Prejudicial error is charged in the admission of testimony based on information obtained by the Government in the course of what appellant claims was an unlawful search and seizure. After consummation of the final sale Cantu signalled four other officers to join him. One was Mr. Ross, the chief federal narcotics officer for the area; another was a state narcotics agent, and still another was a municipal police officer; and, in addition, agent Ross' clerk. Appellant was then and there placed under arrest, a warrant having been previously obtained. They had no search warrant. The arrest was made in the immediate vicinity of appellan'ts hospital. After the arrest appellant was taken into the hospital whereupon agent Ross requested appellant to produce his narcotics dispensation records, his narcotics stamp, his narcotics order forms and all narcotics that he had on hand. Appellant, in

complying with the request, stated that his dispensation records consisted of notations on patients' record cards.

Agent Ross was permitted to testify that he made an examination of the patient cards received from appellant and failed to find one in the name of Cantu. This is the evidence claimed to be inadmissible because it was obtained in the course of an alleged illegal search and seizure. In our opinion no search and seizure was employed in procuring the cards which agent Ross examined, because the records furnished Mr. Ross, upon his demand, were records required by law to be kept by appellant. 26 U.S.C.A. §2554, 1948, imposes upon a dispensing physician the duty to keep a record of "drugs dispensed or distributed, the dates and the name and address of the patient to whom such drugs are dispensed or distributed." Pursuant to 26 U.S.C.A. §2556(a), 1948, such records " . . . shall be open to inspection by officers, agents and employees of the Treasury Department duly authorized for that purpose . . ." Agent Ross was authorized to inspect appellant's dispensing records pursuant to §2555, supra, 26 C.F.R. §151.201, 1949. Appropriate notations kept on pa tients' record cards fulfill the requirements of the statute, 26 C.F.R. §151.178, 1949.

The sole evidence, obtained from the patients' card which the Government introduced was the negative testimony of agent Ross to the effect that he failed to find a card for Cantu among these records. Under the circumstances the records constituted public documents and the Government was entitled to demand their production to inspect them. Davis v. United States, 1945, 328 U.S. 582; Bowles v. Glick, 9 Cir., 1945, 146 F. 2d 566; Westside Ford, Inc. v. United States, 9 Cir., 1953, 206 F. 2d 627; United States v. Kempe, N. D.

Iowa, 1945, 59 F. Supp. 905; United States v. Sherry, N. D. Ill., 1923, 294 Fed. 684.

Of course, federal officers demanding records required to be kept by law may not make such demand in a manner or at a time or place unreasonable under the circumstances. Davis v. United States, supra, pp. 591-592. In each case the court must examine the circumstances incident to the demand.

The situation in the present case is analogous to that described and held reasonable in the Davis decision. The property demanded was property to which the officers were entitled to access. Demand was made at the place of business of the custodian and during business hours, and the custodian produced the documents on demand.

Appellant's specification of error No. IV reads:

> "Prejudicial error was committed by the misconduct on the part of the Assistant U.S. Attorney in asking the defendant if he had ever been convicted of a felony."

The Assistant U.S. Attorney asked:

> "Have you ever been convicted of a felony?"

The appellant answer:

> "Yes. But it is up on appeal."

Appellant charges that the Assistant United States Attorney at the time he asked the question knew that the conviction had been appealed and had not at the time been decided by this Court of Appeals.

The assignment raises the question of the good faith of the prosecutor in asking the question. The answer

is to be found in a determination of whether the prosecutor was justified in concluded that it was a permissible question sanctioned by law.

A majority of the state courts allow the inquiry notwithstanding pendency of an appeal. See Annot. 103 S.L.R., 350, 367, and Annot. 161, A.L.R., 233, 282.

The federal courts are in conflict. The Seventh Circuit in United States v. Empire Packing Co., 174 F. 2d 16, held the question to be proper. A contrary view was expressed by the court of appeals of the District of Columbia in Campbell v. United States, D.C. Cir. 1949, 176 F. 2d 45.

As we read the applicable decisions we do not hesitate to say that an attorney familiar with the state of the law, as we must assume the Assistant United States Attorney was, could very reasonably conclude that the question was proper and be well within the bounds of propriety in asking it.

Counsel representing appellant at the trial must have thought the question proper because he made no objection to it, nor did he move to strike. In fact, on re-direct examination appellant's counsel brought out the character of the crime for which appellant had been convicted and the fact that an appeal was pending.

Appellant says he was entrapped. We see no merit in this contention. According to witness Cantu appellant willingly entered into the unlawful sale of drugs. No persuasion was employed. The defense of entrap ment is not available to one standing ready to commit an offense given an opportunity. Sorrells v. United States, 1932, 287 U.S. 435; Silva v. United States, 9 Cir., 1954, 212 F. 2d 422; Demos v. United States, 5 Cir., 1953, 205 F. 2d 596; and see, Annot., 33 A.L.R. 2d 883.

The Court gave an instruction on entrapment. Appellant finds no fault with the sufficiency of the instruction but complains that instead of giving an instruction on entrapment the Court should have found as a matter of law that he was entrapped, a contention we have hereinbefore disposed of. An instruction on entrapment was perhaps unnecessary but, obviously out of an abundance of caution, the trial court gave one. The instruction was in appellant's favor. He is in no position to complain.

The Government introduced into evidence Exhibits 3 and 4A. These consisted of specimens of morphine and atrophine alleged to have been sold to Cantu by appellant. It is urged that no proper foundation had been laid. Again, no objection was made. Other exhibits, substantially identical, are in evidence as to other sales. The contention is without merit.

Objection is made that the trial court failed to sufficiently emphasize in its instructions that the requirement of the use of Treasury Department order forms or prescription does not apply to sales by a physician to his patients in the course of his medical practice. Again, no objection was made to the instructions given and no additional instruction was offered, nor modification of the given instruction proposed.*

We have examined the charge given by the Court and it sufficiently covers the matter complained of. No prejudicial error appears and the verdict is supported by the evidence.

Judgment affirmed.

(Endorsed:) Opinion. Filed Oct. 12, 1955.

Paul P. O'Brien, *Clerk*

*See Federal Rules of Criminal Procedure 30.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BERNARD BLOCH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 14, 536

Oct. 12, 1955

JUDGMENT

Appeal from the United States District Court for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and Entered: October 12, 1955

PAUL P. O'BRIEN, *Clerk*

APPENDIX "C"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, November 15, 1955.

Before: HEALY, ORR and POPE, Circuit judges.

ORDER DENYING PETITION

FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant, filed November 8, 1955, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

IT IS FURTHER ORDERED that the petition of Appellant for a stay of mandate, be, and hereby is granted, and that the mandate of this Court be, and hereby is stayed to and including the 14th day of December, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 554

BERNARD BLOCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 305–309; Pet. A1–A6) is reported at 226 F. 2d 185.

JURISDICTION

The judgment of the Court of Appeals was entered on October 12, 1955, and a petition for rehearing was denied on November 15, 1955 (R. 311; Pet. A8). The petition for a writ of certiorari was filed on December 7, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether it was reversible error to cross-examine petitioner, on trial for a narcotics violation, as to a conviction for income tax evasion then pending on appeal.

STATEMENT

Petitioner was convicted in the United States District Court for the District of Arizona on six counts charging illegal sales of narcotics in violation of 26 U. S. C. 2554 (a). He was sentenced to imprisonment for two years (R. 26–27). On appeal, the conviction was affirmed (R. 310; Pet. A7).

The government's evidence was that petitioner, an osteopath engaged in the general practice of medicine (R. 176), sold various quantities of morphine solution (R. 51, 54, 58, 60, 64, 65–66, 104) and two tablets of dilaudid (R. 58, 106) to one R. S. Cantu, an agent of the Federal Bureau of Narcotics (R. 95), on six different dates from September 24, 1953, to November 19, 1953 (R. 100, 103, 105, 111, 112, 113). Cantu testified that he was not a patient of the petitioner, was never given a medical examination by petitioner and was not ill (R. 100, 108, 129, 130, 150). Petitioner charged him over $200 for drugs which petitioner could obtain wholesale for about four dollars (R. 306; Pet. A2).

After petitioner had testified in defense that he was treating Cantu as a patient (R. 182–197),

the prosecution asked him, on cross examination, if he had ever been convicted of a felony. Petitioner replied, "Yes. But it is up on appeal." There was no objection to the question and no motion to strike. (R. 222.) Upon re-direct examination, petitioner's counsel developed the fact that petitioner had been convicted on one count for income tax evasion involving $1,000 and acquitted on another count (R. 226–227), and that the conviction was on appeal.[1]

ARGUMENT

Contrary to petitioner's contention (Pet. 2, 4–5), there is no conflict of circuits on the precise point presented by this case, *i. e.*, whether there must be a reversal of a conviction when, in the course of a trial, a defendant is asked a question concerning a prior conviction which is the subject of a contemporaneous appeal.

The Court of Appeals for the Seventh Circuit held in *United States* v. *Empire Packing Co.*, 174 F. 2d 16, certiorari denied, 337 U. S. 959, that a defendant had been properly required to answer such a question over objection. Although the case was tried before the court without a jury, the Court of Appeals did not predicate its decision primarily upon that factor but rather on the principle that until the judgment of the trial court is reversed, the defendant stands con-

[1] That conviction was subsequently reversed on appeal for trial errors. *Bloch* v. *United States*, 223 F. 2d 297 (C. A. 9).

victed. 174 F. 2d at 20. In adopting this view, the Seventh Circuit followed the majority rule in state courts. See 6 A. L. R. 1647; 25 A. L. R. 348; 103 A. L. R. 367; 161 A. L. R. 282.

In *Campbell* v. *United States*, 176 F. 2d 45, the Court of Appeals for the District of Columbia Circuit held that, in a prosecution for assault with intent to rape, it was error to require the defendant to disclose a conviction for petty larceny then pending on appeal. The court nonetheless affirmed the conviction on the ground that the error was not so prejudicial as to require a reversal.

Thus, no court of appeals has held that this type of question is so prejudicial as to warrant reversal of the conviction on such ground alone. Certainly, it was not so prejudicial on the facts of this case where the evidence of guilt was overwhelming, there was no objection raised, and, on re-direct examination, petitioner's counsel developed the character of the prior conviction, the amount of money involved, and the fact that the case was pending on appeal (R. 226–227).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys.

DECEMBER 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955